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Working Out the Tensions:

**Fast Track Authority as a Study in Executive/Congressional
Cooperation**

Robert F. Cekuta
The National
Security Process
Seminar I
Amb. Sommer, FSL
Dr. Kilgour, Advisor

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Congress and the Executive have managed the Constitutional “invitation to struggle” over international trade issues, at least at first glance, with more ease than they seem to have where military power is involved. As with war powers, there is a division of responsibility between the branches and the problem of practicality. The Constitution in Article I, Section 8 puts trade under Legislative purview, but Congress recognizes the Executive is the branch able to negotiate international deals cutting tariffs or opening markets for U.S. exports. The “fast track” procedure first included in the 1974 Trade Act provided a mechanism to resolve tension between constitutional authority and practicality/ effectiveness in international affairs. However, Congress’ refusal of President Clinton’s 1994 request to renew fast track suggests the Legislative’s determination to maintain control and, perhaps, that branch’s greater sensitivity to public sentiment.

What is Fast Track?

Essentially, fast track authority is a means whereby Congress expeditiously approves tariff and other trade agreements negotiated by the Executive as well as any necessary implementing legislation by an up or down vote, i.e., without amendments. The process is needed to reassure foreign counterparts Congress will not lightly revise a deal Administration negotiators reached during bilateral or multilateral talks. The procedure also preserves Congress’ constitutional role with respect to agreements which often involve changes in domestic laws.¹ Congress created the procedure in the 1974 Trade Act, renewed and modified it in the Omnibus Trade and Competitiveness Act of

¹ Committee on Ways and Means of the U.S. House of Representatives. Overview and Compilation of U.S. Trade Statutes. Washington, D.C.: U.S. Government Printing Office, 1993. 68

1988, and provided an eighteen month extension in 1993 so that the Administration could conclude the Uruguay Round of GATT negotiations Under the 1988 Act, the President must

- 1 consult appropriate Congressional committees before entering trade pacts;
- 2 notify Congress 90 days before entering into a trade agreement so that Hill existing laws and help to develop acceptable implementing legislation,
- 3 after entering the agreement, submit its final text to Congress together with a draft implementing bill and supporting information.

Congressional committees then have 45 days to act and each body votes on the bill within fifteen legislative days after it leaves committee ² Amendments are “not in order” and the motion to proceed is “privileged and not debatable ”

The procedure, while statutory, is enacted by each body under its rule-making powers This means either chambers can modify fast track procedures at any time in the same way they might alter any of their other rules of procedure ³ This potential for arbitrary Congressional action, however, has not affected fast track’s usefulness

Why Fast Track Authority?

Congress ceded much of its power to alter tariff rates to the president in the aftermath of the Smoot Hawley tariff bill, the 1930 act which drastically raised U S import duties Economically, Smoot Hawley’s higher import duties damaged international trade and deepened the Depression Another criticism of the law is the

² If committees do not act within 45 days the measure goes to the floor anyway

³ Ways and Means 168

input various interest groups enjoyed in its drafting; political pressures and horsetrading undermined legislators' ability to identify and pursue deeper U S interests

Secretary of State Cordell Hull persuaded Congress to pass the Reciprocal Trade Agreements Act of 1934. The act delegated the President authority to enter agreements that, within certain limitations, reduced tariffs on a mutual basis. It also enabled the U S to implement those agreements without further reference to Congress. Roosevelt used this power to enter into 32 reciprocal trade agreements between 1935 and 1945. Under the bill's 1945 version the United States negotiated and accepted the General Agreement on Tariffs and Trade (GATT).⁴ Moreover, the President accepted the GATT and the limitations it placed on the United States' ability to raise tariffs without referring the document to Congress. Congress also gave various Federal agencies, such as the Treasury, Agriculture, and Commerce Departments, as well as quasi-judicial bodies like the International Trade Commission permanent authority to handle matters such as enforcing trade remedy laws or trade adjustment assistance, albeit under certain and sometimes very specific guidelines and Congressional oversight.⁵

The Legislative, however, had qualms about the power it had delegated long before it demonstrated such concerns about the Executive's overall foreign policy role. Congress refused to recognize the GATT formally, although the 1974 Trade Act shows the legislature accepting it as an international agreement.⁶ More significantly, Congress

⁴ John H. Jackson, "United States Law and Implementation of the Tokyo Round Negotiation," John H. Jackson, John Victor Louis & Masuo Matsushita, Implementing the Tokyo Round: National Constitutions and International Economic Rules, Ann Arbor: University of Michigan Press, 1987, 141.

⁵ Ways and Means, 135.

⁶ Jackson, 45.

refused to approve the Havana Charter and the International Trade Organization (ITO) contained in it. As a result, President Truman withdrew the document in 1950, leading the GATT to assume many of the organizational roles the ITO had been expected to perform. Congress finally revoked the blank check out of displeasure with the Anti-Dumping Code the Administration negotiated in the Kennedy Round of GATT talks and members' belief that the Executive was inattentive to the problems foreign nontariff barriers posed for U.S. companies. Industry and union concerns over the end of the post-World War II trade surplus and the import surge of the late 1960's were also factors in the Hill's move.

More accurately, Congress refused to renew again the 1934 authority. In June 1967, the President's authority to negotiate tariff reductions under the 1962 Trade Expansion Act expired. The Hill did not renew it until the 1974 Trade Act which enabled the United States to join in the Tokyo Round of GATT trade liberalization talks. The Nixon Administration sent Congress a draft trade bill in April 1973, but the text became caught up in the Watergate controversy and the accompanying debate over war powers and other aspects of presidential authority. Although the House passed its version, the Senate would not start serious work on the bill until after Nixon resigned. On January 3, 1975 President Ford signed the new bill which contained for the first time fast track authority, but only for agreements entered into under the act that removed nontariff barriers. The bill also restricted the President's ability to extend most-favored nation treatment to Communist countries, moved antidumping cases from the Treasury to the Commerce Department, which Congress thought would be more likely to side with

U S firms, and established the Special Trade Representative in the Executive Office of the President, charging the STR to keep Congress advised on trade talks. This ended a State/Commerce dispute over who should conduct foreign trade talks and tried to ensure better Congressional oversight. In reality, creation of STR, later renamed USTR, would mean a new player jockeying for the bureaucratic lead in international negotiations. Moreover, STR's small size would mean it depended on other agencies for expertise and staff.

Congressional input into trade agreements became more pronounced with the Uruguay Round. The 1974 Trade Act gave the president authority to accept a multinational trade agreement -- if it conformed to certain criteria -- while requiring Hill approval for major nontariff concessions.⁷ Fast Track authority for the Uruguay Round was much more specific. The Omnibus Trade and Competitiveness Act of 1988 still allows the President to proclaim higher or lower import duties within certain parameters. However, the bill enumerates U S objectives for the Round in considerable detail in Section 1101 as well as the objectives for bilateral trade agreements in Section 1102, the section which also contains the legal basis for fast track. Congress respects a president's right to pursue other trade initiatives as part of his foreign affairs role, but would demand the normal procedure for ratifying those treaties or passing implementing legislation. In short, Congress could amend them to death, a prospect which would scare off most, if not all, foreign partners.

⁷ Jackson 162

The Ugly Reality

Friction, however, remains. Fast track should ensure that Congressional and Executive prerogatives are respected, that U.S. foreign policy and economic interests are served, and that consultations with the Legislature will dissuade an administration from pursuing trade initiatives that could not win Hill support. In reality, the consultations between Congress and the White House to formulate implementing legislation to pass the North American Free Trade Agreement (NAFTA) or the Uruguay Round package were characterized by such strong public debate, vociferous lobbying, and political dealing as to belie the notion that the amendments to the implementing bill are "not in order" or that it is a straight up or down vote. Ironically, the Administration's effort to renew fast track authority in the Uruguay Round implementing shows how political the process is.

The Clinton Administration sought fast track renewal in early 1993 to complete the Uruguay Round. The Administration wanted a clean bill and worked in both bodies to prevent any amendments to the renewal legislation to avoid a conference that would delay the authority and might further complicate the GATT talks.

However, to get the additional eighteen months of negotiating authority, the Administration had to have to offer something in return. Senator Baucus, the Montana Democrat who headed the Trade Subcommittee of the Senate Finance Committee, wanted Super 301 -- the provision in the 1988 Trade Act that required the Executive to identify and pursue foreign practices which significantly damaged U.S. exports -- renewed. Mickey Kantor, the U.S. Trade Representative, promised him the Administration would work with Congress to find a "suitable vehicle" for its renewal and

Baucus agreed to leave Super 301 out of the fast track bill. Kantor also fought Canada over its durum wheat exports to pick up the votes of wheat state senators angry over rising sales of Canadian wheat and a finding by an international panel that Canada, contrary to the charges of U S wheat farmers, was not subsidizing its exports in contravention of the U S Canada Free Trade Agreement. Senators Conrad (D-ND) and Daschle (D-SD) were the only two Senate Finance Committee members who voted against fast track extension. Their stated reason was that recent trade pacts, particularly the U S -Canada Free Trade Agreement, harmed their farming constituents.⁸

The Choice in '94: Uruguay Round or Fast Track

The Clinton Administration wanted Congress to renew fast track authority until 2001 as part of the Statement of Administrative Action for implementing the Uruguay Round agreements. Such an extension would allow the United States to add other western hemisphere states to NAFTA or some other free trade arrangement and to open East Asian markets. However, controversies in the mock mark-ups of the draft Uruguay Round package led Senate Finance Committee Chairman Moynihan to warn the White House in August 1994 that it lacked the votes to get such a measure through the Senate. As a compromise, Kantor offered a 2 1/2 year renewal.⁹ Later in August, the White House proposed another compromise which strongly diluted many of the contentious clauses on the labor and environmental aspects of trade. Nevertheless, by mid September fast track renewal as part of the Uruguay Round package was dead.

⁸ Andrew Taylor, 'Fast-Track Rules Get House OK,' Congressional Quarterly Weekly Report June 26 1993 1638

⁹ Senate Finance Committee Says GATT 'Fast Track' Request Won't Fly, Hill News August 2 1994 Legi-Slate Article 57910

The problem was not the procedure itself, but how the Administration planned to use it. Business interests which favored the Round and which lobbied for its passage balked at Administration proposals to include labor and environmental standards among the negotiating objectives of any future trade agreements eligible for fast track. Industry also opposed provisions in the renewed authority that would have allowed trade sanctions to respond to foreign environmental or labor practices.¹⁰ Senator Danforth (R-MO) wrote Kantor August 17 calling a trade policy linking trade to labor and environmental issues a "fundamental mistake" and announcing he would actively oppose any grant of fast track negotiating authority "which either expressly or implicitly permits the President to negotiate agreements authorizing the use of trade sanctions for labor and environmental purposes."¹¹ At the same time, eighteen House members wrote House Speaker Foley to keep reauthorization of fast track out of the Uruguay Round package. The group said by renewing it under the current fast track procedure, Congress would give away its Constitutional power to regulate foreign commerce.¹²

Also involved in the debate were groups which opposed the Uruguay Round -- period. Opponents included environmentalists, Ralph Nader, and organized labor; the AFL-CIO had long rejected economic theories of comparative advantage in international trade and argued goods produced by lower-paid foreign workers posed unfair competition. Liberals wanted to require that future trade agreements address labor and

¹⁰ Administration Offers New Fast-Track Concessions to Business. GOP, Inside U.S. Trade August 12 1994 S-2

¹¹ Danforth Threatens to Oppose Administration Fast-Track Proposal. Inside U.S. Trade August 12 1994 3

¹² Fair Trade Caucus Calls for Fast Track Proposal to be Dropped. Inside U.S. Trade August 9 1994 S-3

environmental standards, a move conservatives saw as a ploy to stiffen U S laws in those areas¹³ The AFL-CIO decried Kantor's August compromise, which dropped any reference to workers rights from the principle negotiating objectives for trade agreements, as reversing two decades of U S policy and "bowing to the interests of Congressional Republicans"¹⁴ Seven Congressional Democrats proposed returning an environmental provision to the principle negotiating objectives and requiring environmental assessments of trade agreements¹⁵

On September 13, the White House dropped fast track renewal altogether from the Statement of Administrative Action Efforts at compromise had failed and contention over the terms of fast track renewal, specifically over the negotiating objectives for future agreements eligible for fast track, jeopardized passage of the Uruguay Round package as a whole Acting Ways and Means Committee Chairman Sam Gibbons (D-FL) promised to take up fast track renewal at the start of the new Congress With the Republican Congressional victory, the current guess is that the Hill will approve fast track only to negotiate Chile's accession to NAFTA

Conclusion

While fast track helps reconcile Congress' Constitutional authorities with the body's inherent difficulty in identifying opportunities to advance U S economic security interests and inability to conduct international negotiations, it does not eliminate politics

¹³ "Administration Postpones Request for Fast Track Authority," Hill News Sept. 12, 1994 Legi-Slate Article 62202

¹⁴ Administration Offers New Fast-Track Concessions to Business GOP' S-1

¹⁵ Democrats, Environmental Groups Propose Fast Track Alternative Inside U S Trade August 19, 1994 1

or Executive/Legislative conflict Nor is it expected to do so Groups which stand to benefit or to suffer under the new pact, take their cases their representatives to press for the package's approval, rejection, or modification with little regard for the general well-being Ralph Nader called the political maneuvering to get the Uruguay Round package passed "an abuse of executive power and a cynical payoff to those whose support the White House wanted ." In response, USTR General Counsel Ira Shapiro said the remark was similar to the line in Casablanca, "My God, there is gambling going on in the back room ' .. The revelation that there have been compromises to get this through is hardly surprising "16

What fast track has done is provide some measure of order to Congressional approval of international trade agreements By insisting on an up or down vote for the whole agreement, the system may make it easier for individual representatives and senators to accept aspects which might disadvantage some of their constituents, but which will benefit most of their constituents or the country as a whole In the end, fast track is simply a refinement of the Constitutional invitation to struggle Still it proved a highly useful vehicle for working out the inherent Executive/Legislative tensions regarding trade, while at the same time advancing wider U S trade interests, and perhaps most importantly casting the United States as a reliable partner in international trade relations

¹⁶ Scores of Deals Set Stage for GATT Approval Hill News Nov. 28, 1994 Legi-Slate Article 69703

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